

NGUYEN (Migration) [2022] AATA 1940 (16 June 2022)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Thi Thuy Nguyen

REPRESENTATIVE: Ms Karen Louis (MARN: 0003543)

CASE NUMBER: 1816786

HOME AFFAIRS REFERENCE(S): BCC2017/2843733

MEMBER: Moira Brophy

DATE: 16 June 2022

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl 820.211 of Schedule 2 to the Regulations
- cl 820.221 of Schedule 2 to the Regulations
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Statement made on 16 June 2022 at 10:18am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – validly married – financial, household and social aspects of relationship and nature of commitment – consistent and credible evidence – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2), 65
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 820.211(2)(a), 820.221

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 9 August 2017 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because the delegate was not satisfied that the visa applicant was in a genuine and continuing relationship with her sponsor.
4. The applicant, Mrs The Thuy Nguyen appeared before the Tribunal on 14 June 2022 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Mr Hoa An Nguyen, and from Ms Han Trang Pham. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicant was represented in relation to the review. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.
7. *Background*
8. The applicant, Mrs Thi Thuy Nguyen, is a 66-year-old female currently residing in Sydney. She was previously in a defacto relationship with Tien Dat Pham in the period from 1 January 1979 to 1 October 1981. There was a son of the relationship born in 1982. Her parents are deceased, she has three brothers and four sisters living in Vietnam.
9. The sponsor, Mr Hoa An Nguyen, is a 66-year-old male living in Sydney. He was previously married to Thi Kin Diep Nguyen in the period from 1988 to 2000. There were two daughters of the marriage born in 1989 and 1990. He was then married to Huynh Kim Duyen Nguyen in the period from 24 February 2008 to 6 September 2014. He was born in Vietnam and came to Australia in 1982. He became an Australian citizen on 7 March 1990. His parents are deceased, and he has one sister and two brothers living in Vietnam.
10. At the time of application, the parties stated they met on 22 December 2014 in Ho Chi Minh, and they committed to a shared life to the exclusion of all others on 17 June 2017 when they were married.
11. The delegate in refusing the application noted the following concerns:
 - The delegate noted that the applicant initially travelled to Australia to meet two friends. The delegate noted that one of the applicant's friends was actually their previous partner, with whom they had a child. The delegate also noted that the applicant's reasoning for their decision to marry the sponsor was vague and undetailed, and that the applicant, the sponsor and the applicant's former partner all

cohabit at a shared address. On this basis, in addition to the fact the applicant's and sponsor's relationship quickly progressed to marriage, caused the delegate to have concerns about the genuineness the claimed spousal relationship.

- The delegate noted that no evidence had been provided regarding the financial aspects of the parties' relationship, and further that at interview the applicant confirmed that there was no shared ownership of assets. The delegate found that the financial aspects of the relationship were not sufficiently evidenced to be demonstrative of being in spousal relationship.
- The delegate noted that the applicant and sponsor provided copies of their driver's licenses to indicate they lived at claimed shared address, however the delegate determined on balance that this was not sufficient evidence of their household being one of a couple in a spousal relationship.
- The applicant and sponsor provided two supporting statements from friends and family and a selection of photographs of the parties. The delegate also noted that the applicant and sponsor had travelled together outside of Australia. The delegate determined to give some weight to this evidence of social aspects of the relationship.
- Because of the concerns the delegate raised regarding the claimed relationship, the delegate determined on balance that the applicant and sponsor had not sufficiently demonstrated that the nature of their commitment to one another was demonstrative of being in spousal relationship.

12. On 7 October 2021, the Tribunal wrote to the applicant and requested information relating to various aspects of the applicant and the sponsor's relationship.

13. On 21 October 2021 the applicant provided the following material to the Tribunal:

- ID documentation relating to the applicant, the sponsor and the applicant's son;
- Resubmission of Marriage Certificate;
- Medical documentation relating to a friend of the Applicant and the Sponsor;
- Supporting statements from friends and family of the applicant and the sponsor, dated October 2021;
- Selection of photos, including photos of the applicant and the sponsor in the company of family and friends (various dates, although few if any appear to be from 2020-2021 period);
- Evidence of communications between the applicant and the sponsor during the 2016-2017 period;
- Relationship statement from the applicant, dated 20 October 2021;
- Joint bank account documentation relating to the applicant and the sponsor, covering period for parts of 2019-2021;
- Travel documentation indicating the applicant and the sponsor travelled together to Melbourne in 2018;
- Documentation relating to the applicant and the sponsor's claimed shared address;

- Tax-return documentation relating to the sponsor, in which the applicant is stated to be the Sponsor's spouse (2019-2020 financial year);
 - Correspondence from the ATO addressed to the applicant at address claimed to be shared with the sponsor;
 - Medical certificate issued to the applicant, bearing address claimed to be shared with the sponsor.
14. On 29 November 2021 the Tribunal contacted the applicant's Authorised Representative, seeking to confirm whether the applicant intended to provide any further information in response to its 7 October 2021 communication to the Representative. The Authorised Representative confirmed that further information would be presented to the Tribunal and requested a time extension in which to do so. The Tribunal granted this request, and on 8 December 2021 the Applicant's Authorised Representative provided the following materials to the Tribunal:
- Relationship statement from the Sponsor, dated 2 December 2021.

Tribunal proceedings

15. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the visa applicant and sponsor at the hearing.
16. The parties gave coherent oral evidence about the circumstances in which they met, the development of their relationship and their current living arrangements. The Tribunal found them to be credible and was satisfied it could rely on their evidence in making findings of fact.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are in a spouse or de facto relationship

17. Clauses 820.211(2)(a)] and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
18. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

19. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 17 June 2017 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

20. Financial

21. The parties reside together in a granny flat at the rear of a property owned by their mutual friend Mrs Han Trang Pham. The parties do not pay rent as such, but the sponsor maintains the gardens at the property. The applicant works one day a week cleaning and for that she is paid around \$200 each week. She is paid in cash. The sponsor retired in October 2021. He has just made a claim through Centrelink to be paid the age pension. He also does gardening for a friend on weekends and is paid around \$200 in cash. In addition to the cash monies the parties earn the sponsor has been able to draw down in some \$32000 he had in superannuation.
22. The parties have a joint account where the pay of the sponsor was deposited when he was in paid employment. The applicant said she was not able to operate the account. The sponsor previously had a loan which was paid out of the account. The loan was taken out before he met the applicant and he has two instalments remaining to pay. Both parties gave consistent evidence on the loan and the instalments paid and balance remaining.
23. The parties have savings of around \$8,000 which is kept at home. The applicant owns a property in Vietnam which she has tried to sell but that has been difficult during the pandemic. She intends to sell that property and use the proceeds to buy property in a rural area where they would live and would hope to be able to grow their own vegetables. They presently do not have any joint real estate.
24. The Tribunal finds the financial aspects of the parties' relationship are consistent with their being in a genuine spousal relationship both at the time of application and at the time of decision.

25. Nature of the household

26. The Tribunal accepts the parties have lived together on a continuing basis since they married in June 2017.
27. The parties provided consistent and convincing evidence regarding the arrangements for their household. The applicant is responsible for the majority of the cooking and the washing. The sponsor does the majority of the household chores. Both parties do the grocery shopping.
28. The evidence of the establishment of a joint household provides significant weight in support of the finding of a genuine and continuing relationship.
29. The Tribunal finds the nature of the household is consistent with their being in a genuine spousal relationship at the time of application and at the time of decision.

30. *Social aspects of the relationship*

31. The parties provided a number of statutory declarations from family and friends which attested to the genuineness of the relationship. The information in these declarations is consistent with the other evidence before the Tribunal.
32. As noted above the Tribunal found the oral evidence provided by the parties to be clear and persuasive evidence that the parties have been in a loving couple relationship for over five years and that they provide one another with considerable support.
33. The parties provided documentary evidence to support their oral evidence at the hearing that they have enjoyed trips to visit family in Vietnam and to see parts of Australia.
34. On the basis of the oral evidence of the parties and the evidence provided by way of photographs, the Tribunal finds that the relationship between the visa applicant and her sponsor is recognised and supported by their family and friends. The Tribunal is satisfied that the parties represent themselves as being married to one another to their family, friends, and the wider community.
35. The Tribunal finds the social aspects of the relationship are consistent with their being in a genuine spousal relationship at the time of application and at the time of decision.

36. *Nature of the person's commitment to each other*

37. The Tribunal finds that the visa applicant and her sponsor have been in a committed relationship since they met in December 2014. They have lived together continuously since June 2017.
38. The parties were familiar with the details of each other's family. The Tribunal was mindful that neither party had any siblings in Australia. While the parties had lived in a granny flat of a property owned by the applicant's former partner, he has since deceased. His wife gave oral evidence of the relationship between the parties and of the assistance provided to her by the applicant and sponsor. The evidence of the applicant as to their living arrangements was corroborated by this evidence.
39. The Tribunal has had the advantage of being able to observe the parties together at the hearing and to hear their evidence. Their emotional support for each other and companionship was readily apparent. They presented as a couple who respected each other and who believed their later years would be enriched if they shared it with another person who shared their values.
40. The parties demonstrated a detailed knowledge of each other's lives and daily routines. Their evidence about their future plans was consistent. The Tribunal is satisfied that the visa applicant and her partner were committed to being in a long-term relationship. The degree of companionship and emotional support the parties clearly draw from one another provides significant weight in support of the finding that the parties are in a genuine and continuous relationship.

41. **Conclusion**

42. The Tribunal has had the benefit of receiving oral evidence in person from the parties as well as seeing the parties interact with each other. It has also received a considerable amount of additional information that was not before the delegate. The Tribunal accepts the parties were inexperienced and that led to them not understanding the type of documentation required by the original decision maker.

43. Given these findings, the Tribunal is satisfied that at the time of application the parties are validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal is satisfied the parties live together and therefore do not live separately and apart on a permanent basis.
44. On the basis of the above the Tribunal is satisfied that the requirements of s 5F (2) are met at the time the visa application was made and at the time of this decision.
45. Therefore, the applicant meets cl 820.211(2) and cl 820.221.
46. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

47. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl 820.211 of Schedule 2 to the Regulations
 - cl 820.221 of Schedule 2 to the Regulations

Moira Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).